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Decision

Matter of: Energy Systems Group

File: B-402324

Date: February 26, 2010

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Kenneth G. Wilson, Esq., Department of the Navy, for the agency.
Jonathan L. Kang, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging potential offeror's exclusion from competition on the basis of an organizational conflict of interest (OCI) is denied where the agency reasonably concluded that the protester's preparation of a report that was used to prepare a statement of work for a competitive solicitation created a biased ground rules OCI.

DECISION

Energy Systems Group (ESG), of Hampton Roads, Virginia, protests its exclusion from the competition under request for proposals (RFP) No. N40085-09--5083, issued by the Department of the Navy, Naval Facilities Engineering Command, for energy conservation and efficiency design-build services at Naval Station Norfolk, Virginia. ESG contends that the Navy unreasonably concluded that the protester's preparation of a study that was used by the agency to develop the statement of work (SOW) for the RFP created a biased ground rules organization conflict of interest (OCI) that required its exclusion from the competition.

We deny the protest.

BACKGROUND

As part of ongoing government-wide efforts to reduce energy consumption, the Navy sought to improve the energy efficiency of facilities at Naval Station Norfolk. The agency sought to obtain the energy efficiency services through a utility energy service contract (UESC). Under a UESC, an agency may enter into a sole-source contract with a utility company for services where energy cost savings are shared

between the government and the contractor. Contracting Officer (CO) Statement ¶ 3. A utility contractor may provide financing for the capital costs of a UESC, which are reimbursed over the contract term from the agency's energy cost savings. 42 U.S.C. § 8256 et seq.; 10 U.S.C.A. § 2913. The Department of Defense may enter into a UESC by utilizing various contract vehicles, such as an existing General Services Administration (GSA) indefinite-delivery/indefinite quantity (ID/IQ) or a basic ordering agreement.

In August 2008, the Navy issued a task order under a GSA ID/IQ contract to Virginia Natural Gas (VNG) to perform a feasibility study for an energy efficiency project, known as steam decentralization, at the Norfolk Naval Station. The report was to identify energy conservation measures for lighting, water, heat, and the removal of two hangars from the station's central steam heat system. VNG utilized ESG as a subcontractor for the task order. The study was intended to be the basis for defining the scope of work for a UESC to perform the energy efficiency design-build work. CO Statement ¶ 3. In this regard, the feasibility study stated that "[VNG] and ESG are providing this detailed study to determine whether particular conservation project opportunities proposed are feasible." Agency Report (AR), Feasibility Study, Executive Summary, at 1. The protester states that it understood that VNG was expected to receive the UESC on a sole-source basis, and that ESG would continue to work as a subcontractor to VNG. Protest at 7; see also AR, Feasibility Study, Executive Summary, at 32-34.

ESG's feasibility study provided the Navy with recommendations to improve energy efficiency at various buildings, utilizing specific engineering approaches and equipment. See id. at 16-19, 37. Under the task order, ESG performed the following work: (1) assessed 32 buildings for conversion from steam to natural gas heat, (2) assessed 53 buildings for lighting upgrades, (3) assessed 37 buildings for water upgrades, and (4) prepared cost estimates for the work. Id. at 2, 39.

After the feasibility study was provided by ESG to the Navy, the agency received funding for the work phase of the requirements under the American Recovery and Reinvestment Act of 2009 (Recovery Act), Pub. L. No. 111-5 (2009). The Navy concluded that in light of the funding, the financing that VNG would have provided through the energy efficiency contract was no longer required. AR at 3 n.5.

The Navy then concluded that the use of Recovery Act funds required the energy efficiency design-build contract to be awarded on the basis of full and open competition. CO Statement ¶ 5. The agency prepared an RFP, which was issued on October 19, 2009. The agency states that approximately 80 percent of the requirements for the solicitation's SOW was based on the feasibility study prepared by the protester. Navy Engineer Decl. ¶ 3. Offerors were provided a copy of the feasibility study as an attachment to the RFP.

On November 9, ESG requested that the Navy advise whether the firm had an OCI that precluded its competition for the design-build contract, based on its preparation

of the feasibility study. The protester states that it made the request because it believed that other potential offerors were considering protesting the participation of ESG in the competition, based on its preparation of the feasibility study. Protest at 8.

In its letter, ESG acknowledged that its role in preparing the feasibility study could be construed as creating an OCI under Federal Acquisition Regulation (FAR) §§ 9.505-2(b)(1) and (2), based on the Navy's use of the feasibility study in preparing the SOW. AR, Exh. 2, ESG Letter to Navy, Nov. 9, 2009, at 1. ESG argued, however, that because the protester and the Navy had initially anticipated that the design-build contract would be awarded on a sole-source basis, the preparation of the feasibility study did not create an OCI within the meaning of FAR subpart 9.5. ESG also requested that, in the event that the agency believed an OCI did exist, the agency find that the OCI had been mitigated, or, alternatively, waive any OCI.

On December 2, the CO advised ESG that she viewed the firm's role in preparing the feasibility study as creating a "biased ground rules" OCI. AR, Navy OCI Determination, Dec. 2, 2009, at 1. The CO based her OCI determination on three factors: (1) ESG prepared the feasibility study, and the study led "directly to the statement of work of the subject RFP"; (2) ESG's work placed the firm "in a position to describe the work in the subject RFP [in] a manner beneficial to itself"; and (3) the OCI still existed despite the fact that neither the Navy nor ESG was aware of the possibility that the feasibility study would be used to create the SOW for the competitive procurement of these energy efficiency services. CO Statement ¶ 7. The CO also concluded that the OCI was not mitigated by the release of the feasibility study to potential offerors, and that the agency would not consider waiving the OCI. AR, CO OCI Determination, Dec. 2, 2009, at 2. On December 4, ESG filed this protest.

DISCUSSION

ESG argues that the Navy unreasonably excluded the protester from the competition based on a biased ground rules OCI arising from the protester's preparation of the feasibility study. The protester does not dispute the Navy's statement that 80 percent of the SOW requirements were based on the feasibility study. Instead, the protester raises two primary arguments: (1) the facts here do not constitute a biased ground rules OCI under FAR subpart 9.5 because, at the time ESG prepared the feasibility study, a competitive procurement was not anticipated, and therefore ESG's work could not have affected such an unanticipated competition; and (2) even if an OCI existed, the preparation of the feasibility study did not give a competitive advantage to ESG, and therefore the agency had no basis for excluding the protester from the competition. As discussed below, we find no merit to the ESG's arguments.

The FAR generally requires contracting officers to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's

objectivity. FAR §§ 9.504, 9.505; Snell Enters., Inc., B-290113, B-290113.2, June 10, 2002, 2002 CPD ¶ 115 at 3. The situations in which OCIs arise, as addressed in FAR subpart 9.5 and the decisions of our Office, can be broadly categorized into three groups: biased ground rules, unequal access to non-public information, and impaired objectivity. The FAR identifies general rules and cites examples of types of OCIs that may arise, and ways to avoid, neutralize, or mitigate those OCIs. FAR § 9.505. The general rules and examples, however, are not intended to be all-inclusive, and the FAR recognizes that “[c]onflicts may arise in situations not expressly covered in this section 9.505 or in the examples in 9.508.” Id.; see also, Lucent Techs. World Servs. Inc., B-295462, Mar. 2, 2005, 2005 CPD ¶ 55 at 4-6.

In general, COs must exercise “common sense, good judgment, and sound discretion” in assessing whether a potential conflict exists and in developing appropriate ways to resolve it; the primary responsibility for determining whether a conflict is likely to arise, and the resulting appropriate action, rests with the contracting agency. FAR § 9.505; Science Applications Int’l Corp., B-293601.5, Sept. 21, 2004, 2004 CPD ¶ 201 at 4. Once an agency has given meaningful consideration to potential conflicts of interest, our Office will not sustain a protest challenging a determination in this area unless the determination is unreasonable or unsupported by the record. Science Applications Int’l Corp., supra.

As relevant to the protester’s allegations, a biased ground rules OCI arises where a firm, as part of its performance of a government contract, has in some sense set the ground rules for the competition for another government contract by, for example, writing the SOW or providing materials upon which a SOW was based. FAR §§ 9.505-1, 9.505-2. In these cases, the primary concern is that the firm could skew the competition, whether intentionally or not, in favor of itself. Operational Resource Consultants, Inc., B-299131, B-299131.2, Feb. 16, 2007, 2007 CPD ¶ 38 at 6.

ESG first argues, in essence, that a biased ground rules OCI cannot arise from materials prepared by a firm that did not know that its work might be incorporated into a SOW for a competitive procurement. In this regard, the protester contends that when it prepared the feasibility study it assumed that it would receive this contract on a sole-source basis. Thus, in ESG’s view, it had no ability to affect the eventual competitive procurement.

In support of its position, ESG notes that the FAR describes one kind of biased ground rules OCI as follows:

(b)(1) If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services—or provides material leading directly, predictably, and without delay to such a work statement—that contractor may not supply the system, major components of the system, or the services unless—

(i) It is the sole source;

- (ii) It has participated in the development and design work; or
- (iii) More than one contractor has been involved in preparing the work statement.

FAR § 9.505-2(b).

ESG focuses on two elements of this FAR provision, arguing that the phrase “to be used in competitively,” and the word “predictably” both indicate that a firm may be excluded from a competition on the basis of an OCI only where the firm knows in advance that its work could be incorporated into a SOW.

We do not agree with the protester that the phrase “to be used competitively” means that the agency had to know that the contractor-prepared materials would be used competitively at the time they were prepared in order to be covered by the restriction here. Instead, the phrase “to be used competitively” refers to a work statement that is to be used in competitively acquiring a system or services—which is precisely the circumstance at issue here. We see no reason to impose the kind of limitations on this language that the protester seeks.

Similarly, we do not read the phrase “predictably” to mean, as the protester contends, that an OCI arises only where a firm understands in advance that the materials it prepares might be later incorporated into a SOW for a competitive procurement. In this regard, we think the phrase “provides material leading directly, predictably, and without delay to such a work statement” refers to the relationship between the subject matter of the contractor-prepared materials and the resulting SOW.¹ We do not think that the protester has shown that these FAR restrictions are limited to situations where the firm and the agency understand, in advance, that the work might or will be incorporated into a SOW for a competitive solicitation.

Furthermore, we note that an agency’s decision to exclude a potential offeror from a competition based on the offeror’s preparation of materials that are incorporated into a SOW generally involves a backward-looking analysis, in that the agency must assess whether the offeror’s prior work created an OCI. In this regard, adopting ESG’s interpretation of FAR subpart 9.5 would prohibit an agency from excluding an offeror from a competition based on a biased ground rules OCI unless the agency and offeror were aware that the offeror’s work might at some point in the future be

¹ Additionally, FAR § 9.505-2(b)(2) states that “contractors are prohibited from supplying a system or services acquired on the basis of work statements growing out of their services;” this restriction anticipates an even less temporally-specific statement of the relationship between a firm’s work and a SOW that might be based upon such work.

used in a SOW. Such a restriction would unreasonably obligate an agency to either avoid using contractor-prepared materials in a SOW, or allow a contractor to compete for a contract award where it has, effectively, set the ground rules for the competition. We do not think that the protester's interpretation is consistent with the broad discretion accorded to COs under FAR subpart 9.5.

Our Office has held that an agency may exclude a firm from a competition where that firm prepared materials that were subsequently incorporated into a SOW for a competitive procurement. SSR Eng'g, Inc., B-282244, June 18, 1999, 99-2 CPD ¶ 27; Basile, Baumann, Prost & Assocs., Inc., B-274870, Jan. 10, 1997, 97-1 CPD ¶ 15. While these decisions do not directly address the foreseeability argument raised by ESG here, we think that they stand for the proposition that agencies are required to assess whether the use of contractor-prepared materials in a SOW for a competitive solicitation creates a biased ground rules OCI—whenever the decision to use contractor prepared materials is made. In sum, we find no merit to the protester's argument that the Navy's OCI determination here was inconsistent with its authority under the FAR.²

Next, ESG argues that even if the facts here can be viewed as potentially creating an OCI under FAR subpart 9.5, the protester gained no competitive advantage from the preparation of the feasibility study and the agency therefore had no basis to conclude that the protester's preparation of the study created a biased ground rules OCI. In this regard, the protester contends that because it did not know that the feasibility study would be incorporated into a SOW for a competitive procurement, it had no reason or ability to skew the competition to its benefit.

As our Office has held, the relevant concern for a biased ground rules OCI is not simply whether a firm drafted specifications that were adopted into the solicitation, but, rather, whether a firm was in a position to affect the competition, intentionally or not, in favor of itself. L-3 Servs., Inc., B-400134.11, B-400134.12, Sept. 3, 2009, 2009 CPD ¶ 171 at 8. ESG argues that it was not in a position to affect the competition because, in its view, a feasibility study merely assesses what energy conservation measures were possible to perform. The protester also contends that it was not in a position to affect the competition because the agency was required to make the ultimate decision as to what parts of the study would be used in the SOW.

Here, however, the study provided recommendations as to which energy conservation projects should be performed and the technical solutions that should be used, and prepared cost estimates. See AR, Feasibility, Executive Summary,

² Additionally, as discussed above, FAR subpart 9.5 states that OCIs may arise in situations other than those specifically described in the FAR. FAR § 9.505; see Lucent, supra, at 4-6. Thus, we think that the CO effectively set forth a basis for excluding ESG from the competition on the basis of its preparation of the feasibility study, separate and apart from the specific scenario set forth in FAR § 9.505-2(b).

at 16-19, 37. The RFP explained that the SOW solicitation had adopted the feasibility study's specifications as follows:

The basis of design (BOD) for each facility energy conservation measure (ECM) and steam conversion for this project are included in Part 6 Attachments of this RFP, referred to as the "ECM Feasibility Study." The ECM Feasibility Study provides a detailed listing of facility requirements as documented in the "Detailed Building Breakdowns." The contractor shall develop design and construction drawings based on this BOD.

RFP, part 3, at 4. The RFP further describes much of the contract technical requirements and objectives by reference to the feasibility study. See id. chs. 1-6.

As discussed above, the protester does not dispute the agency's statement that approximately 80% of the SOW requirements were based directly on the feasibility study. We think that the record shows a clear relationship between the feasibility study—which established which projects should be performed and the likely costs of those projects—and the requirements in the SOW. In this regard, the protester acknowledges that the "underlying objective [of the feasibility study] was to communicate to the agency whether or not" specific energy conservation measures "could reasonably be utilized by the agency for its stated purpose." Protester's Comments on AR at 6. The protester also acknowledges, as discussed above, that it assumed that it would perform these projects on a sole-source basis. Protest at 7.

We think that the Navy was reasonably concerned that ESG could have described the work in a way that was advantageous for itself to perform on a sole-source basis; for this reason, we also think that the agency reasonably concluded that ESG's work created a biased ground rules OCI when the agency incorporated that work into the SOW for a competitive procurement. On this record, we see no basis to sustain the protest based on ESG's arguments.

The protester also argues that any potential OCI was mitigated by the fact that the Navy provided the feasibility study to all offerors as part of the RFP. We disagree and we do not think that the agency acted unreasonably when it concluded that the OCI here was not, and could not, be mitigated. The provision of the feasibility study might have been a reasonable means to mitigate an OCI if the agency had viewed the conflict as arising from an unequal access to information. Here, however, the OCI was not based on ESG's access to the information in the study, but was instead based on the unfair competitive advantage that was created by the possibility that ESG was able to shape the competition through its drafting of the feasibility study

upon which the SOW was based. On this record, we see nothing unreasonable about the agency's conclusion that this OCI could not be mitigated.

The protest is denied.

Lynn H. Gibson
Acting General Counsel